IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER DELTA AIR LINES, INC.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in nullifying the clear and unambiguous, mandatory imposition of costs under Rule 68 of the Federal Rules of Civil Procedure;

2. Whether the Court of Appeals exceeded its authority by rewriting Rule 68;

3. Whether, in any event, the Court of Appeals and the District Court abused discretion by denying costs to the prevailing party under either the "liberal" reading of Rule 68 or the unchallenged reading of Rule 54(d).

THE PARTIES

Plaintiff, Rosemary August, was an employee of defendant, Delta Air Lines, Inc., who claimed that Delta discriminated against her in violation of federal law and further maliciously defamed her to her great damage.

Judgment on the merits was ordered for Delta, but Delta became the appellant below in an appeal from a ruling denying its costs under FED. R. CIV. P. 68.

Delta is here the Petitioner; Ms. August the Respondent.

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Federal Rules of Civil Procedure

Federal Rules of Criminal Procedure

State Rules of Civil Procedure

Miscellaneous

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Jt App pp 2-7)[1] is reported at 600 F 2d 600. The decision of the District Court (Jt App pp 8-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1979. On August 28, 1979 Delta's timely petition for rehearing and suggestion for rehearing *en banc* was denied (Jt App p 1). Delta's petition for a writ of certiorari was filed within ninety days thereafter and was granted on April 21, 1980.

STATUTES AND RULES INVOLVED

The relevant provisions of the Rules Enabling Act (28 U S C §§ 2071, 2072), the Civil Rights Act of 1964 (42 U S C § 2000e *et seq*), the Fees Bill Act (28 U S C § 1920), 28 U S C § 1331 and Fed R Civ P 1, 4(a), 30(g)(1) and (2), 37(a)(4), (b)(2)(E), and (d), 41(d), 45(f), 54(d), 56(a), (b), (c) and (g), 68 and 81(a) are set forth in a separate Appendix to this brief.

1 Jt App refers to the Joint Appendix filed with the Court by Delta Air Lines, Inc and Rosemary August as provided in Rule 36 of the Rules of the Court.

STATEMENT OF THE CASE

On January 4, 1977, Rosemary August ("plaintiff") sued Delta Air Lines, Inc. ("Delta") alleging that her employment termination was unlawful under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). Ms. August demanded reinstatement to her flight attendant position, back pay, benefits, other equitable relief, attorneys' fees, and costs (Jt. App. pp. 2-3, 19-20). She also alleged that Delta maliciously defamed her, and thus denied her subsequent employment. Under this count plaintiff sought $150,000 actual and punitive damages (Jt. App. p. 19). Delta denied all substantive allegations.

On May 12, 1977, Delta served upon plaintiff the following offer of judgment (Jt. App. pp. 33-34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Plaintiff declined the offer of judgment and elected to proceed to trial. Thereafter, the District Court granted Delta's Motion for Partial Summary Judgment and dismissed with prejudice plaintiff's defamation claim, plaintiff having acknowledged she could present no facts in support of this allegation (Jt. App. p. 20). After an extended twenty five day trial, the District Court entered judgment in favor of Delta, stating (Jt. App. pp. 24, 32):

> [T]he court has no difficulty in reaching its decision.
>
> * * *
>
> [T]his trial record does not establish that [Delta's] employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro.

On appeal the Court of Appeals affirmed the judgment of the District Court stating that plaintiff's evidence of discrimination "was superficial, incomplete, inadequate or otherwise defective." (Jt. App. p. 16).

While the District Court awarded judgment to Delta, it nevertheless ordered: "Each party will bear its own costs of litigation." (Jt. App. p. 32). Delta advised the District Court of its offer of judgment and moved the Court to order plaintiff to pay costs under FED. R. CIV. P. 68 ("Rule 68"). On September 18, 1978, the District Court denied the motion holding that the "Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule. . . ." (Jt. App. p. 12). The District Court apparently weighed the $450 offer against the likelihood it would "fully satisf[y]" the plaintiff's incurred costs in attorneys' fees (Jt. App. p. 12), and concluded that the amount of the offer "could only have been effective were the plaintiff's claim totally lacking in merit. . . ." (Jt. App. p. 12).

The Seventh Circuit affirmed the denial of Delta's Rule 68 motion to recover litigation costs (Jt. App. pp. 2-7). The Court of Appeals rejected the application of a literal reading of Rule 68 to Title VII cases, referring to such as "a technical reading" (Jt. App. p. 7). Instead, the court adopted a discretionary standard and held that in the context of a Title VII case a trial judge may weigh various factors including the timing and "good faith" of the offer, the outcome of the claim, the amount claimed, and the litigation risks involved (Jt. App. p. 7).

SUMMARY OF ARGUMENT

Delta, knowing full well that it had not defamed and had not discriminated against plaintiff, nevertheless made an offer of judgment to plaintiff pursuant to FED. R. CIV. P. 68. The ultimate judgment was for Delta.

Rule 68 provides that if the offeree does not obtain more by judgment than the offer made, the "offeree must pay the costs incurred after the making of the offer." Delta contends that this clear and unambiguous language of Rule 68 requires a mandatory imposition of costs upon the offeree in a situation such as this.

Delta submits that the origin of Rule 68 and its subsequent amendment in 1946 emphasize its mandatory cost shifting prescription. All rules of construction support and confirm the conclusion that Rule 68 mandates the imposition of costs where the offeree ultimately receives less than that which is offered.

The courts below determined that the imposition of costs upon the unsuccessful plaintiff was not mandatory, but remained a matter for judicial discretion, a judicial determination as to whether the offer was reasonable or made in good faith.

Delta avers that the creation of these standards is not only contrary to the clear mandate of the language of Rule 68, but that the engraftment of such conditions upon the rule is not justified by policy, logic or wisdom.

The general concept of every citizen having a right to a day in court is neither denied nor chilled by requiring that citizen to evaluate the merits of his or her claim. The specific policy of providing judicial redress to all victims of discrimination does not justify a license to impose on innocent defendants the rising costs of litigation.

The mandatory cost shifting feature of Rule 68 implements and effectuates its obvious purpose: the certainty that a plaintiff will be liable for subsequent litigation costs if the plaintiff is comparatively unsuccessful at trial will encourage litigants to more closely examine the merits of their positions, thereby encouraging "the just, speedy, and inexpensive determination" of their action (FED. R. CIV. P. 1).

Delta submits that Rule 68 in no way chills a Title VII plaintiff's legitimate access to our judicial system. Rule 68 does impose upon that plaintiff the obligation to realistically evaluate the merits of his or her claim. Delta states to this Court that such an imposition is consistent with and required by policy, logic and wisdom.

Further, Delta urges that the courts below exceeded their authority by usurping the rulemaking powers delegated exclusively by Congress to this Court. By judicial decision, the courts below redrafted Rule 68 (to include conditions upon its cost imposition provision) and amended Rule 81 (by excluding Rule 68 from Title VII cases).

Finally, Delta contends that both under the lower courts' newly conceived discretionary standards of Rule 68, as well as the normal standards of Rule 54(d), Delta was entitled to costs in the instant case.

ARGUMENT

I.

RULE 68 MANDATES THE SHIFTING OF COSTS WHENEVER THE OFFEREE RECOVERS LESS THAN THE OFFER

A. The Language of the Rule Is Clear and Unambiguous

As pointed out by Mr. Justice Powell in *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 756 (1975) (concurring), "the starting point in every case involving construction of a statute is the language itself". Rule 68 states that the offeree *must* pay the costs incurred after the making of the offer if the offeree has received less by way of judgment.

No case has been found in which the word "must" has been interpreted as anything but an imperative. In *Berg v. Merchant*, 15 F. 2d 990, 991 (6th Cir. 1926) *cert. den.* 274 U. S. 738 (1927), the court stated:

> "[T]he word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may'."

The word "must" is used in only three other Federal Rules of Civil Procedure, and in each case found involving these three rules, the mandatory "must" has been applied in a non-discretionary matter.[2]

2. *Rule 74(a)*

> Otherwise he *must* obtain leave on motion upon notice to all parties. . . .

See State Mutual Life Assurance Company v. Arthur Andersen & Co., 65 F. R. D. 518, 521 (S. D. N. Y. 1975); *Meilinger v. Metropolitan Edison Company*, 34 F. R. D. 143, 145 (E. D. Pa. 1963); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1454 (Rev. ed. 1973).

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In *Caminetti v. United States*, 242 U. S. 470 (1917), this Court recognized that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the Court is to enforce it according to its terms." *Id.* at 485. That instruction is no less applicable today and is no less applicable to the construction of a rule of procedure than it is to a statute.[3]

On its face Rule 68 denies the validity of the Seventh Circuit's substitution of a discretionary standard for the mandatory cost shifting provision approved by Congress. The language of Rule

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Rule 30(a)

> Leave of court, granted with or without notice, *must* be obtained. . . .

See Brause v. Travelers Fire Insurance Co., 19 F. R. D. 231, 234 (S. D. N. Y. 1956); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F. R. D. 169, 171 (S. D. N. Y. 1956); 8 WRIGHT & MILLER, *supra* at § 2104.

Rule 56(e)

> When a motion for summary judgment is made . . . an adverse party . . . *must* set forth specific facts. . . .

See *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160 (1970); *Macklin v. Butler*, 553 F. 2d 525, 528 (7th Cir. 1977); *Felix v. Young*, 536 F. 2d 1126, 1135 (6th Cir. 1976); *Turoff v. May Co.*, 531 F. 2d 1357, 1362 (6th Cir. 1976); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F. 2d 102, 109 (2nd Cir. 1975); *Stevens v. Barnard*, 512 F. 2d 876, 878 (10th Cir. 1975); *Brown v. Ford Motor Co.*, 494 F. 2d 418, 420 (10th Cir. 1974); *Pace v. Southern Express Co.*, 409 F. 2d 331, 334 (7th Cir. 1969); *Town House, Inc. v. Paulino*, 381 F. 2d 811, 814 (9th Cir. 1967); *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967); *Foy v. Norfolk & Western Railway Co.*, 377 F. 2d 243, 246 (4th Cir. 1967); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F. 2d 150, 154 (5th Cir. 1965).

3. It has long been recognized that the Federal Rules of Civil Procedure "have the force and effect of statutes." *Winor v. Daumit*, 179 F. 2d 475, 477 (7th Cir. 1950).

68 is clear and unambiguous and should be so interpreted. To do otherwise is to ignore the imperative "must," thereby eviscerating the rule.

B. The History of Rule 68 Confirms the Clarity of Its Mandate

Offers of judgment were first introduced into the federal judicial system in 1938, the Advisory Committee Notes offering no explanation other than the citation of certain state statutes which already provided for offers of judgment and the mandatory shifting of costs.[4] While only Minnesota, Montana, and New York were cited, several other states had established procedures for offers of judgment prior to 1938.[5]

State court decisions rendered pursuant to the respective state procedures clearly reveal that a non-discretionary imposition of costs was applied under said procedures. In New York, a state cited by the Advisory Committee, it was held that cost shifting was mandatory. *Kanney* v. *Russel*, 3 Duer 689, 690 (Super. Ct. N.Y. 1854); *Marquis* v. *Soloman & Berck*, 223 A.D. 634, 229 N.Y.S. 157 (App. Div. 1928). Similar statutes were interpreted in the same manner in Nebraska (*Wachsmuth* v. *Orient Insurance Co.*, 49 Neb. 590, 68 N.W. 935 (1896)), in

4. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 303 (1939); 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (Rev. Ed. 1973).

5. *See, e.g.* California—Cal. Proc. Code § 997 (West Supp. 1978); Colorado—*Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921); Connecticut—*Wordin* v. *Remis*, 33 Conn. 216 (1866); Indiana—*Prather* v. *Pritchard*, 26 Ind. 65 (1866); Kansas—*West* v. *Springfield Fire & Marine Ins. Co.*, 104 Kan. 157, 185 P. 12 (1919); Nebraska—*Wachsmuth* v. *Orient Ins. Co.*, 49 Neb. 590, 68 N.W. 935 (1896); Nevada—*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920); Oregon—*Hammond* v. *Northern Pac. R. Co.*, 23 Or. 157, 31 P. 299 (1892); South Dakota—*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928); Wisconsin—*Newton* v. *Allis*, 16 Wis. 210 (1862).

Nevada (*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920)), and in South Dakota (*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928)). In *Hammond* v. *Northern Pac. R. Co.*, 23 Ore. 157, 31 P. 299 (1892), the Oregon Supreme Court stated: "[U]nless the plaintiff accept [the offer], or recover a more favorable judgment, the defendant is entitled to costs accruing subsequent to such offer." 31 P. at 301.

The citation of existing similar statutes by the drafters of Rule 68 is evidence that they intended it to operate in the federal courts as it had in the various states; thus, an automatic, non-discretionary operation was dictated.

Furthermore, in 1946 Rule 68 was amended. Of compelling significance is the fact that the language requiring an unsuccessful offeree to pay costs was changed at that time from "*shall* pay costs" to the present language of "*must* pay costs". (Jt. App. p. 35).[6]

6. The Advisory Committee Notes to the 1948 amendments do not specifically discuss this change from "shall" to "must". However, in the Report of the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure (reproduced in 5 F.R.D. 433 (1946)) it is stated with respect to Rule 68 that "[defendant's] first and only offer will operate to save him the costs from the time of the offer if the plaintiff ultimately obtains a judgment less than the sum offered." 5 F.R.D. at 482. Further, a First Draft of the Advisory Committee (submitted by Walter P. Armstrong as "Proposed Amendments To Federal Rules For Civil Procedures" and reproduced in 4 F.R.D. 124 (1946)) indicated that Rule 68 was changed to "remove ambiguities" and stated that the amended provision would provide that "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of such offer." 4 F.R.D. at 126. Additionally, in the final Recommendations of the Advisory Committee (submitted by Walter P. Armstrong and reproduced at 5 F.R.D. 339 (1946)), the changes in Rule 68 are discussed in the section titled "Ambiguities Resolved and Unresolved," wherein the

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It is impossible to perceive of a more clear expression of the intention of the drafters of Rule 68. A discretionary operation was neither envisioned nor drafted.

C. The Comparison of Rule 68 Language to Other Relevant Regulatory and Statutory Language Confirms Its Mandatory Character

The courts below held that Rule 68 did not mandate the shifting of costs, finding instead that the shifting of costs would be determined by the court depending upon whether it deemed the offer reasonable or made in good faith. Thus, the courts below construed Rule 68 as permitting the exercise of judicial discretion.

However, in other federal rules which pertain to costs of litigation, where discretion is intended words of discretion are used rather than the imperative word "must". Thus, Rules 30 (g)(1) and (2) provide that parties failing to attend or to serve subpoenas "may" be ordered to pay the attending party reasonable expenses and attorney's fees.[7] In contrast, Rule 68 provides that costs "must" shift to a plaintiff who recovers less than the offer of judgment.

Rule 41(d) provides that a defendant served with a previously dismissed action may recover costs of the action previously dismissed "as [the court] *may* deem proper." If the Rule 68 cost shifting provision were subject to a similar discretionary standard it would have been so drafted.

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sentence changing "shall" to "must" is quoted. 5 F.R.D. at 450. While the comments and intentions of the Advisory Committee are not binding, they are entitled to some weight in interpreting the Federal Rules. *See Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

7. The Federal Rules of Civil Procedure cited in this and the following paragraphs are reprinted in an Appendix attached to this brief for convenience. References in this brief to "Rule ____" are, unless otherwise indicated, to the Federal Rules of Civil Procedure.

Congress has preserved the distinction between the meaning of "may" and "must" in the drafting of other statutes as well. In 28 U.S.C. § 1331 (1970), it is provided that where a plaintiff is adjudged to be entitled to less than the jurisdictional prerequisite amount of $10,000, "the district court *may* deny costs to the plaintiff and, in addition, *may* impose costs on the plaintiff." The obvious reason for this provision was to discourage suits for less than the requisite amount. *A. J. McKee, Inc. v. Schoonveld*, 341 F.2d 737 (10th Cir. 1965). However, Congress left it to the discretion of the trial court as to whether a plaintiff in such a case should be ordered to pay the costs by use of the permissive "may". *Gordon v. Longest*, 41 U.S. (16 Peters) 97 (1842).[8]

Similarly, when Congress intended that other considerations, such as financial strain or mitigating circumstances should play a role in the apportioning of litigation costs, it explicitly set forth the relevant considerations. For example, Rule 45(f) limits judicial authority to deem a refusal to obey a subpoena a contempt of court by requiring that the court consider the adequacy of the excuse. Rules 37(a)(4), (b)(2)(F), and (d), provide that discovery sanctions in the form of "reasonable expenses . . . including attorney's fees" are to be awarded "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." If the fiscal adequacy of a Rule 68 offer were relevant in determining whether the rule's requirements were otherwise met, language identical or similar to that drafted in Rule 45(f) or Rule 37 would have been used. To the contrary, the 1946 amendment to Rule 68 is an unusually demonstrative indication

8. Moreover, the word "may" is used three times in Rule 68. It is a fundamental principle of statutory construction that "[w]here both mandatory and directory verbs are used in the same statute, . . . it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meaning." 2A SUTHERLAND STATUTORY CONSTRUCTION § 57.11 (4th ed. 1973).

that this rule is and was intended to be a *mandatory* cost shifting provision. The application and operation of this rule was not intended by the framers to depend upon judicial discretion. The Court of Appeals improperly disregarded unmistakable intent implemented in unequivocal language in the instant case.

There is likewise no warrant for the "bad faith" standard implicitly engrafted upon Rule 68 by the courts below. Not only is there no basis in the record for implying that Delta's offer was made in bad faith, there is no basis for the application of a "bad faith" standard to Rule 68 in any event. Rule 68 sets forth only one standard – a comparison between the offer and the offeree's eventual recovery. If the offer is greater than the recovery, the offeree pays the offeror's costs from the date of the offer.

When Congress intended a "bad faith" standard to apply, it has so stated. For example, Rule 56(g) provides that recovery of expenses and attorney's fees is authorized when it appears to the satisfaction of the court that affidavits in summary judgment matters "are presented in bad faith." But nowhere in Rule 68 do the terms "good faith" or "bad faith" appear.[9] The recognized authorities on the Federal Rules agree that Rule 68 is a non-discretionary cost shifting provision. 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3005 (Rev. ed. 1973) ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."); 7 Pt. 2 MOORE'S FEDERAL PRACTICE ¶ 68.06 (1979) ("[defendant's] first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered.").

9 If, as the District Court implies (Jt. App. p. 12), the language of the Court in *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974) engrafts a bad faith standard in determining whether a "proper offer is made," it is inconsistent with

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The fact that Congress changed the language of Rule 68 in 1946 to ensure that its application was mandatory and has subsequently not changed the language constitutes a legislative judgment which cannot be judicially disregarded or repealed. Mandatory cost shifting is an integral yet distinct part of the comprehensive procedural system carefully designed to secure "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. The courts below improperly dismantled the grand design by removing the essential element of certainty in Rule 68. This is the incentive upon which the effective operation of Rule 68 depends. Only if the litigating parties know that costs will shift will offers of judgment be encouraged and will plaintiffs realistically review their cases before going to trial. Delta merely asks this Court to apply the plain meaning of the very language it adopted pursuant to the rulemaking authority delegated to it by Congress in the Enabling Act of 1934, 28 U.S.C. §§ 2071, 2072 (1970).[10]

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the single comparative standard expressly provided in Rule 68. The *Mr. Hanger* court properly recognized that Rule 68 is a mandatory cost shifting provision. ("It cannot be questioned that the rule itself is couched in mandatory terms. . . ." 63 F.R.D. at 610). The court's discussion of bad faith came as a result of plaintiff's claim that the offer was a "sham". No such claim was or can be advanced on the record in this case.

10 All other federal cases interpreting Rule 68, while not directly addressing the issue raised herein, have implicitly accepted the automatic, non-discretionary operation of Rule 68. *See, e.g., Truth Seeker Co., Inc.* v. *Durning*, 147 F.2d 54, 56 (2nd Cir. 1945); *Stallend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F.R.D. 240, 242 (W.D. La. 1949), *rev'd in part on other grds.*, 181 F.2d 320 (5th Cir. 1950); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W.D. La. 1940); *see also* 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3005 (Rev. ed. 1973). Further, in federal cases which have mentioned Rule 68 either in comparative contexts or without any explication of its operation, no indication is

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D. The Decisions Below Nullify the Intersectional Harmony Between Rule 68 and Other Rules Dealing with Costs and Pretrial Resolution

By imposing a discretionary standard upon the mandatory cost shifting language of Rule 68, the Court of Appeals merged Rule 68 and Rule 54(d). Because this unsupportable consequence violates settled principles of construction and overrules the manifest intent of the framers of Rule 68, the decision below must be reversed.

This Court has assiduously preserved the individual integrity of each federal rule, recognizing that each rule plays a particular role in securing "the just, speedy, and inexpensive determination of every action." *See Hanna* v. *Plumer*, 380 U. S. 460 (1965); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). Consistent with this principle, federal trial courts have uniformly adopted the principle of intersectional harmony. "Each separate rule is related to the general plan of the others and must be so construed." *United States* v. *Purdome*, 30 F. R. D. 338, 339 (W. D. Mo. 1962); *accord, Mahler* v. *Drake*, 43 F. R. D. 1, 3 (D. S. C. 1967). Delta contends that properly harmonized, Rule 68 eliminates the discretion governing cost awards which is availabie to the courts under Rule 54(d).[11]

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given therein of a discretionary application. *See, e.g., Mason* v. *Belieu*, 543 F. 2d 215 (D. C. Cir.) *cert. denied*, 429 U. S. 852 (1976); *Thomas* v. *Trans World Airlines, Inc.*, 457 F. 2d 1053 (3d Cir. 1972); *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd.*, 577 F. 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Perkins* v. *New Orleans Athletics Club*, 429 F. Supp. 661 (E. D. La. 1976); *Honea* v. *Crescent Ford Truck Sales*, 394 F. Supp. 201 (E. D. La. 1975).

11. *Simonds* v. *Guaranty Bank & Trust Co.*, 480 F. Supp. 1257, 1261 (D. Mass. 1979) ("Indeed, Rule 68 is by nature a restriction
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This contention obtains its premise directly from Rule 54(d). On its face, Rule 54(d) denies the priority over Rule 68 granted it by the courts below; indeed, Rule 54(d) is subordinate to Rule 68. *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113 (N. D. Cal. 1979). Rule 54(d) provides in pertinent part:

> "*Except when express provision therefor is made . . . in these rules*, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." (Emphasis added)

Rule 68 is nothing if not such an express provision; it requires mandatory recovery of costs in cases where an offer of judgment is made and the offeree recovers less than the offer. In this one circumstance Rule 68 limits the scope of and supersedes Rule 54(d). In all other cases, Rule 54(d) applies. The language "except when express provision thereof is made . . . in these rules" creates the operational distinction between these rules; this distinction was improperly merged, and thereby nullified, by the courts below. This specific caveat preserves the design of the framers, and thereby allows each rule to operate freely and independently within its separate sphere. The courts below erroneously applied discretion to a non-discretionary rule, there-

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of that [Rule 54(d)] discretion since it mandates an award of costs when its terms are met."); *see also Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). There an employee of the Veteran's Administration sued alleging race discrimination in the denial of a promotion. Before trial the government defendants made a Rule 68 offer. Plaintiff rejected the offer, proceeded to trial and, as in the instant case, had her claim dismissed on the merits. As part of his dismissal order Judge Richey ordered that each party bear its own costs. Thereafter, the federal defendants brought to the judge's attention the fact that a Rule 68 offer had been made. After contrasting Rule 54(d) with Rule 68, Judge Richey stated:

> "Rule 68 automatically charges the plaintiff with the defendant's costs incurred after an offer of judgment. . . . The plain language of the rule eliminates the Court's discretion." 79 F. R. D. at 697.

by subordinating Rule 68 to Rule 54(d) and denying Rule 68 the specific means chosen by the framers to effectuate Rule 1.

Rule 68 also supplements Rules 56(a) and (b) of the Federal Rules. These latter rules, like Rule 68, reduce the costs of litigation and conserve limited judicial time, but through a different technique. Summary judgment motions compel disclosure of the merits of the case thereby eliminating continuing litigation where the merits of the claim can be decided without trial. This means of eliminating trial litigation is not permitted where a material fact issue exists. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159-60 (1970); *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852, 853-4 (6th Cir. 1978). When summary judgment is not available, Rule 68 provides the defendant with a means of avoiding the costs of trial. The decisions of the courts below deprive all defendants of this complementary method for pre-trial resolution.[12] Preservation of Rule 68's role as a primary means of avoiding costly and time-consuming trials is particularly important in Title VII cases. Promotional, hiring, and certainly discharge discrimination claims almost invariably involve fact questions which cannot be satisfactorily resolved by affidavit. *See McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). An offer of judgment notices a plaintiff of potential cost liability if the final judgment is less than the offer. By rejecting the offer the plaintiff freely assumes the risk, and there is no persuasive policy reason why the plaintiff should be relieved of the known consequence of his or her own conduct. When the plain meaning of the mandatory language is recognized and applied, Rule 68 effectuates the policy of Rule 1 and provides a functional alternative to protracted litigation where Rule 56 motions are futile.

12. Indeed, if the courts below are reversed, the use of Rule 68 may reduce the number of inappropriate summary judgment motions now flooding the federal district courts. "All too often, unfortunately, counsel have made utterly unjustified summary judgment motions." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2712 (Rev. ed. 1973).

Rule 68 as drafted by the framers plays an important, albeit not widely utilized, part in the Federal Rules. Its purposes are two-fold: to encourage settlements and thereby avoid protracted litigation, and, where the litigation goes forward, "to fix responsibility for costs thereafter." *Staffend* v. *Lake Central Airlines, Inc.*, 47 F. R. D. 218, 219 (N. D. Ohio 1969); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W. D. La. 1940). Rule 68 implements Rule 1 by providing a plaintiff with a certain financial incentive to avoid protracted litigation. It is precisely because Rule 68 mandates cost shifting that a plaintiff is encouraged to give his or her claims greater pretrial scrutiny than might be made when no offer of judgment is made. Rule 68 discourages marginal litigation, thereby securing the injunction of Rule 1, particularly the "speedy and inexpensive determination of every action." *See Herbert* v. *Lando*, 441 U. S. 153, 177 (1979); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 234 (1964).

By its construction of Rule 68, the Court of Appeals has not only rendered Rule 68 essentially duplicative of Rule 54(d), it has nullified the intersectional harmony of the various rules of procedure. This result is manifestly contrary to the framers' intent and, accordingly, must be reversed.

E. The Court of Appeals Erred in Creating an Exception to Rule 68 for Title VII Plaintiffs.

The Court of Appeals, without analysis, based its affirmance of the District Court opinion in part on its perception that a contrary ruling would have a "chilling effect" on Title VII plaintiffs (Jt. App. p. 6).

The proper application of Rule 68 does not, and cannot, chill a meritorious claim; it does and can only provide a plaintiff with a speedy and efficient resolution of his or her claim. The disapproval of procedures which inhibit plaintiffs from bringing Title VII actions stems from the public policy

against unlawful employment discrimination. The purpose of the policy, however, is not to encourage frivolous litigation but to assist unsophisticated plaintiffs in the initiation of Title VII lawsuits. Rule 68 does not contravene the policy because it does not affect the initiation of litigation. Its limited purpose does not take effect until *after* suit is filed. Rule 68 does not deter the initial resort to litigation; rather, it provides a monetary incentive to the plaintiff to review the claim realistically in light of the offer.

The Court of Appeals' fear of a chilling effect on Title VII plaintiffs resulted from its failure to define properly the limited purpose of Rule 68. In fact, there is no persuasive basis for nullifying Rule 68's legitimate and salutary purpose because of a principle of judicial access which the rule in no way affects. Congress has not seen fit to guarantee Title VII plaintiffs riskless and expense-free litigation. The public policy behind Title VII may encourage individuals to initiate suits, but it does not include a guarantee of success. Where the risk of litigation is freely assumed, Rule 68 operates to reimburse a defendant who has no control over the plaintiff's choice to proceed to trial but who attempts to influence that decision in favor of settlement through an offer of formal judgment against the defendant.

An obstinate plaintiff who nevertheless proceeds to trial assumes the normal risk of lack of success. Rule 68 operates in conjunction with this normal litigation risk by shifting costs only on the basis of the result of trial and, even then, only as to costs which are incurred after the offer is made. The rule clearly does not discourage the initiation of litigation but it does provide that once a claim is filed, the Title VII plaintiff, like any other litigant, must realistically assess the chances of recovering more from the defendant at trial than the defendant offers by judgment. Rule 68 thereby preserves incentives for plaintiffs to accept an offer of judgment and avoid protracted litigation without "chilling" resort to the court in the first instance.

II.

BY ITS ADMITTED REWRITING OF RULE 68, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY

By inferentially interpreting the word "must" to mean "may", the Court of Appeals has improperly rewritten Rule 68.

A. The Supreme Court Has Primary Responsibility for Promulgating the Federal Rules

Congress, by the enactment in 1934 of the Rules Enabling Act, U. S. C. § 723 b *et seq.* (current version at 28 U. S. C. §§ 2071, 2072 (1970)), empowered this Court to promulgate rules of practice and procedure in the district courts.[13] Upon taking effect, the Federal Rules of Civil Procedure acquire the force of federal statutes, controlling all district courts. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 13 (1941); *United States* v. *Brandt*, 8 F. R. D. 163, 165-64 (D. Mont. 1948); *C. J. Wieland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 252 (E. D. Wis. 1945).

13. Sections 1 and 2 of that Act, as amended (28 U. S. C. §§ 2071, 2072), provide in pertinent part:

> § 2071. Rule-making power generally
>
> The Supreme Court . . . may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.
>
> § 2072. Rules of civil procedure
>
> The Supreme Court shall have the power to prescribe by general rules, the forms of . . . motions, and the practice and procedure of the district courts . . . of the United States in civil actions. . . .
>
> • • •
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof. . . .

The proper construction and application of the Federal Rules have traditionally been a subject of great concern to this Court. See, e.g., *Schlagenhauf v. Holder*, 379 U. S. 104, 111 (1964); *La Buy v. Howes Leather Co.*, 352 U. S. 249, 256 (1957); *Los Angeles Brush Manufacturing Co. v. James*, 272 U. S. 701, 706 (1927). Indeed this Court has manifested its responsibilities with respect to the rules by allowing the extraordinary writ of mandamus to issue where a lower court has acted in derogation of the rules. In *Los Angeles Brush Mfg.*, Chief Justice Taft for a unanimous Court stated:

> [W]e think it clear that where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force . . . it may use its power of mandamus and deal directly with the district court in requiring it to conform to them. 272 U. S. at 706.

Schlagenhauf v. Holder, 379 U. S. at 111; *La Buy v. Howes Leather Co.*, 352 U. S. at 256.

The instant case represents the first substantive construction of the cost shifting provisions of Rule 68 by a court of appeals. The Seventh Circuit's interpretation has resulted in its decision now to follow the rule as written. While district and circuit courts unquestionably have the right to interpret the rules, they have no authority to effectively nullify or extirpate them. The Court of Appeals exceeded its authority and this Court should remedy that usurpation.

B. Rewriting of the Rules Should Be Done by Legislation, Not Judicial Interpretation

Under the guise of interpretation, the Court of Appeals has admittedly redrafted Rule 68. Without regard to the policy arguments for or against a mandatory construction and operation of the rule in a Title VII context, the lower courts have erroneously encroached upon the legislative function. This Court has consistently held that fundamental changes in the Federal Rules are subjects for rulemaking, not judicial decision. Thus,

in *Harris v. Nelson*, 394 U. S. 286, 299 (1969), this Court stated:

> We have no power to rewrite the Rules by judicial interpretation. . . . 394 U. S. at 298. And in *United States v. Robinson*, 361 U. S. 220, 229 (1960), in a case involving interpretation of Federal Rules of Criminal Procedure 32(a) and 52(b), this Court stated:
>
> > [S]uch practical policy arguments may be made both for and against greater flexibility. . . . It is indeed evident that that policy question, involving as it does many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. 361 U. S. at 229.

Further in *United States v. Johnston*, 268 U. S. 220, 227 (1925), in response to the Government's argument that the strict and prescribed procedures and rules operative in admiralty proceedings were in need of revision, Mr. Chief Justice Warren declared for a unanimous Court:

> The Government contends that . . . the rule has become an anachronism and is out of line with the practice in other courts and with the general rules of practice for federal courts. But it should be observed that, where the procedure has been changed in this regard, it has been the result of legislation or rulemaking and not the decisional process. . . . We think that if the law is to change it should be by rulemaking or legislation and not by decision. 268 U. S. at 227-28.

The conclusion of this Court in *United States v. Robinson*, 361 U. S. 220 (1960), is particularly compelling herein. However one may see the proper resolution of the policy questions involved, it was beyond the power of the Court of Appeals to resolve it. 361 U. S. at 229.

C. Rule 68 Contains No Exceptions and Rule 81(a) Does Not Exempt Title VII Actions from the Federal Rules

The underlying litigation in this case was of a civil nature, jurisdiction based upon Title VII of the Civil Rights Act

of 1964, as amended. Private discrimination actions under Title VII can only be maintained in the federal courts. 42 U. S. C. § 2000e-5(f)(3). However, no provision in the Civil Rights Act of 1964, as amended, precludes the application of Rule 68 to this express grant of federal court jurisdiction. Suits by allegedly aggrieved claimants under Title VII are not within any of the specific federal rules exclusions set forth in Rule 81(a). In the absence of express statutory displacement, the Federal Rules apply by their own force to "all suits of a civil nature" in federal district courts. FED. R. CIV. P. 1. Given the inclusive language of Rule 1, legislative silence means that Rule 68 applies to Title VII actions. Indeed, this Court has recently had occasion to comment upon the applicability of the Federal Rules to Title VII cases: "We by no means suggest that the Federal Rules are inapplicable to the EEOC's § 706 actions." *General Telephone Co. v. EEOC*, ... U. S. ....., 48 U. S. L. W. 4513, 4517, n. 16 (1980) (FED. R. CIV. P. 23 inapplicable to EEOC initiated suits because such suits are not class actions as defined by the rule.)

That Congress intended Rule 68 to apply to private Title VII actions is particularly compelling because Congress is ultimately responsible for the adoption of all federal rules. Congressional awareness is not merely a negative inference supported by silence. On the contrary, it is an affirmative presumption that since 1938 Congress has been alert to the content of each rule because Congressional approval is a prerequisite to implementation under the Rules Enabling Act of 1934.[14] Where Congress expresses no reservation over the language or operation of a particular rule, nor otherwise exempts its application to a class of cases, uniformity and certainty must prevail. The Seventh Circuit early recognized this conclusion compelled by the Enabling Act's procedure. "That Congress was familiar with

14. As amended in 1950, rule changes adopted by this Court become effective 90 days after submission to Congress absent adverse action. 28 U. S. C. § 2072 (1970).

the rules as transmitted to it, must at least be assumed." *Sibbach v. Wilson & Co.*, 108 F. 2d 415, 417 (7th Cir. 1939), *aff'd in pertinent part*, 312 U. S. 1 (1941). But, unfortunately, the Seventh Circuit forgot to heed its own admonition in the instant case.

More specifically, this Court has rejected arguments that particular kinds of cases warrant dispensations from the unambiguous requirements of the Federal Rules. Thus, in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974), in a case interpreting the requirements of Rule 23(c)(2), this Court stated:

> "The short answer to these arguments is that individual notice . . . is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." 417 U. S. at 176.

And in *First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968), this Court explicitly rejected the suggestion that Rule 56(e) should, in effect, be read out of antitrust cases.

The inescapable conclusion from Congress' awareness of Rule 68 and its failure to supersede expressly its application to private Title VII suits is that Rule 68 applies to Title VII actions.[15] We submit that the courts below should have recognized and applied the clear and unambiguous language of Rule 68, and should not have attempted to engraft a judicially created Title VII exception upon the clear mandate of the rule.

15. See *Dual v. Cleland*, 79 F. R. D. 696 (D. D. C. 1978), where Judge Richey properly applied Rule 68 to a private Title VII lawsuit.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DENYING DELTA RECOVERY OF LITIGATION COSTS

Assuming, *arguendo*, that Rule 68 could be construed as permitting judicial discretion in awarding costs, Delta is nevertheless entitled to recover its litigation costs in this case.

Even if the courts below were correct in imposing a good faith test, or a reasonableness test, upon the application of Rule 68, it cannot be disputed that Delta's offer was made in good faith, and, as events proved, was reasonable. Good faith is a measure of the offeror's motivation and intent, and when Delta knew it had violated no law and nevertheless made an offer of judgment, its good faith should be beyond question. As to reasonableness, that concept also may only be measured in terms of the results, not the expectations of litigation; the resultant judgment proved that Delta's offer was more than reasonable.

Furthermore, putting Rule 68 aside, Section 706(k) of Title VII codifies the American Rule by awarding costs to the prevailing party and Rule 54(d) recognizes that costs should be allowed *"as of course"* to the prevailing party unless otherwise directed by the court. Here the defendant is the prevailing party as plaintiff's Title VII case was dismissed on the merits. While Rule 54(d) and Section 706(k) are permissive and reserve cost awards for the trial court's discretion, in order to justify a denial of costs there must be a showing that the prevailing party should be penalized. *See Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), *cert. den.* 338 U. S. 948 (1950); *accord, Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142, 146 (6th Cir. 1959). In the instant case neither the trial court nor the Court of Appeals suggested Delta conducted its defense at trial in bad faith or inflated costs, or introduced

irrelevant defenses or issues. And, although Delta's initial conclusion was that it had neither defamed Ms. August nor terminated her for any reason except good cause (a judgment confirmed at trial and on appeal), Delta offered Ms. August $450 above what it believed she deserved in order to avoid trial costs. No reasonable basis, as defined by traditional notions of sound discretion, exists for the denial of costs in this case. There was no reason given, no showing whatsoever, as to why Delta should have been denied costs "as of course."

In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), this Court noted that a vigorous defense is as important an element in a fair adversary system as a vigorous prosecution. 434 U. S. at 419. Congress was concerned that *reasonable* claims be brought to the judicial system. Unless costs can be recovered, practically the entire burden of Title VII litigation is carried exclusively by the defendant. The adversary system is transformed into a capitulation system where the plaintiff enjoys substantial incentives to sue and the defendant suffers under a substantial disincentive to defend. Such an untoward result was not intended by the framers of Rules 54(d) and 68 nor by the drafters of Title VII.

CONCLUSION

We submit that for the reasons stated above, the denial of costs to Delta under the circumstances here involved constituted a clear violation of the mandate of Rule 68. We believe that the lower courts erroneously assumed the authority to rewrite the rule, and did so without logical or legal justification. Finally, we submit that, in any event, the denial of costs to Delta constituted an abuse of discretion by the trial court under Rule 54(d).

Delta asks this Court to remand this case to the Court of Appeals with directions to return it to the District Court for proceedings consistent with the granting of Delta's Rule 68 motion for an order compelling costs to be paid it and to accept a bill of costs submitted pursuant thereto, as defined in 28 U.S.C. § 1920 (1970). Further, Delta asks that the costs of all appeals be taxed against plaintiff.

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Appendix

APPENDIX TO BRIEF FOR PETITIONER DELTA AIR LINES, INC.

APPENDIX A

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 102, 63 Stat. 104.

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall

in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

As amended May 24, 1949, c. 139, § 103, 63 Stat. 104, July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158, July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

APPENDIX B

Title VII of the Civil Rights Act of 1964
42 U. S. C. § 2000(e) *et seq.* as Amended

* * * * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement which the person aggrieved is a party, the Commission, or the Attorney General

in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intevene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) of (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * * * *

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX C

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

APPENDIX D

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721.

APPENDIX E

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX F

Rule 14.

Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

APPENDIX G

Rule 30.

Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

* * * * *

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the

party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

As amended Jan. 21, 1963, eff. July 1, 1963; March 30, 1970, eff. July 1, 1970; March 1, 1971, eff. July 1, 1971; Nov. 20, 1972.

APPENDIX H

Rule 37.

Failure to Make Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

* * * * *

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

* * * * *

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify

on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * *

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees,

caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

APPENDIX I

Rule 41

TRIALS

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.

APPENDIX J

Rule 45

Supboena

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, aff. July 1, 1970.

APPENDIX K

Rule 54.

Judgments; Costs

* * * * *

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

As amended Dec. 27, 1946, eff. March 19, 1948; Apr. 17, 1961, eff. July 19, 1961.

APPENDIX I.

Rule 56.

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

* * * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * * *

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX M

Rule 68.

Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

As amended Dec. 27, 1947, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX N

Rule 81.

Applicability in General

(a) To What Proceedings Applicable.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10 U. S. C. §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U. S. C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, U. S. C. relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise

provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C. Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review order of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c 372, §§ 9 and 10 (49 Stat. 453), as amended, U. S. C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce order of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U. S. C., Title 8, § 1451, remain in effect.

(7) Abrogated, April 30, 1951, eff. 1, 1951.